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No. 96-828

In The

Supreme Court of the United States

October Term, 1996

THE DRY CREEK RANCHERIA,

Petitioner,

vs.

IN RE BRIDGET and LUCY R., minors, CINDY R. and RICHARD A., JAMES and COLLETTE R., and THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California Second Appellate District, Division Three

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

In an obvious attempt to confuse the issues and draw this Court's attention away from the real reasons why this Court should grant petitioner's Petition for Writ of Certiorari (i.e., the decision of the Court below violates the Indian Child Welfare Act ("ICWA"), conflicts with the decisions of the highest courts of other states which have rejected the "existing Indian family" exception to the ICWA, prevents the uniform application of federal law throughout the United States and frustrates the overriding federal policy adopted by Congress in the ICWA) the respondents, and each of them, essentially make three arguments in support of their position that the Writ of Certiorari should be denied by this Court: (1) that neither Bridget and Lucy R. ("the twins"), nor their father, Richard A., are Indian, and that Richard A. signed, in the first instance, a valid "relinquishment" not a "consent" to the adoption; (2) that the decision below is not final since the issue of the existence of the "existing Indian family" exception was remanded to the trial court; (3) that the petitioner ("Tribe") abandoned its federal preemption argument below and, therefore, cannot raise it now before this Court; and (4) that the interests of the twins would best be served by this Court denying the petition.

In this brief, petitioner shall demonstrate: (1) that the twins and Richard A. are Indians and that Richard A. never validly consented to the adoption of his children; (2) that the decision of the Court below is final within the meaning of 25 U.S.C. § 1257, as interpreted by this Court in *Cox Broadcasting Corporation v. Cohen*, 420 U.S. 469 (1975) ("*Cox*"); (3) that the Tribe argued in the Court

below that the "existing Indian family" exception doctrine was preempted by the provisions of the ICWA and, therefore, has the right to raise that argument before this Court, and (4) that the interests of the twins would best be served by this Court granting the petition so that they can be reunited with their natural parents at a critical stage in their development.

ARGUMENT

I.

THE TWINS AND RICHARD A. ARE INDIANS WITHIN THE MEANING OF THE ICWA AND RICHARD A. NEVER VALIDLY CONSENTED TO THE ADOPTION OF HIS CHILDREN.

A. The Twins And Richard A. Are Indians Under Tribal Law.

This Court has consistently recognized that an Indian Tribe has the authority to determine its own membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 n. 18 (1978); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *Roth v. Burney*, 168 U.S. 218 (1897). Tribal membership requirements may be established by usage, written law, treaty with the United States, or even by inter-Tribal agreement. *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904).

The power of an Indian Tribe to determine questions of its own membership derives from the Tribe's sovereign powers as a distinct political entity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978). A "Tribe's right to define its own membership for Tribal purposes has long

been recognized as central to its existence . . . . [T]he judiciary should not rush to create causes of action that would intrude on these delicate matters." *Id.*

Despite respondents' assertion to the contrary, Richard A. and the twins are Indians as defined by Tribal law. The Tribe is federally recognized and organized under Articles of Association ("Constitution") which were approved by the Secretary of the Interior on August 22, 1979 (RT 1217). Prior to the adoption of the Constitution, the Tribe governed itself in accordance with its customs and traditions (RT 1248). Under those customs, any lineal descendant of a person whose name appears on the Tribe's original June 4, 1915 Tribal roll was considered a member of the Tribe at birth. (RT 18).

Richard A. is a lineal descendant of a Tribal member from the 1915 roll. Under Tribal law, he is now, and since birth, has always been, a member of the Tribe. (RT 354-355). As direct lineal descendants of Richard A., the twins, born after the adoption of the Tribe's Constitution, were eligible for membership in the Tribe. Karen A., submitted the twins' application for enrollment, under the Tribe's Constitution, on or about March 4, 1994, which was subsequently approved by the Tribe. (CT 3052-3056.) Under Tribal law, the twins are, therefore, enrolled members of the Tribe. (RT 354-355.)

B. Richard A. And The Twins Are Indians As Defined By Congress Under The ICWA.

Pursuant to its plenary power under the Indian Commerce clause, Congress, under the ICWA, has defined an Indian as any person who is a member of an Indian Tribe

(25 U.S.C. § 1903 (3)) and defined an "Indian child" as a member of an Indian Tribe *or* any person who is eligible for membership in an Indian Tribe and who is the biological child of an Indian Tribal member (25 U.S.C. §1903 (4)).

As shown above, Richard A. has been a member of the Tribe since his birth. He is, therefore, an Indian as defined by Congress under the ICWA. The twins were eligible for membership in the Tribe at the time of their birth and were subsequently enrolled in the Tribe. They are, therefore, Indian children, as defined by Congress under the ICWA.

C. Richard A. Never Validly Consented To The Adoption Of The Twins.

The respondents continue to refuse to recognize that this case is governed by the ICWA, rather than state law. It makes no difference, for purposes of federal law, whether Richard A. signed a "relinquishment" or "consented" to the adoption of his minor children under state law. As the father of Indian children, under the ICWA, Richard A. could not "relinquish" or validly give his "consent" to the adoption of his minor children unless the "relinquishment" or "consent" was "executed in writing and recorded before a judge of competent jurisdiction, . . . accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained" and understood by [Richard A.]. (25 U.S.C. §1913 (a)).

The record in the Court below is clear. Richard A. never executed the "relinquishment" in conformity with the provisions of the ICWA. Consistent with the ICWA,

Richard A. may withdraw the relinquishment "at any time and, upon such withdrawal," his children " shall be returned" to his custody. (25 U.S.C. §1913 (b)).

As set forth above, the Tribe has demonstrated that its petition does not contain misstatements of law or fact. Having clearly shown that the statement of the case contained in the Tribe's petition is accurate, the Tribe will now respond to respondents' substantive legal arguments.

II.

THE CALIFORNIA COURT OF APPEALS DECISION IS FINAL FOR PURPOSES OF THIS PETITION.

In *Cox* this Court established specific exceptions to the final judgment rule:

> . . . but as the cases have unfolded, the Court has reoccurringly encountered situations in which the highest court of a state has finally determined the federal issue presented in a particular case, but in which there are further proceedings in the lower state courts to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state court.
>
> * * *
>
> . . . there are cases such as Radio Station WOW, supra, and Brady v. Maryland, [citation omitted] in which the federal issue, finally decided by the

> highest court of the State, will survive and require decision regardless of the outcome of further state court proceedings.

Id., at 477-480.

This case clearly falls within this exception. First, the Court below has ruled that without the judicially created "existing Indian family" exception, the ICWA "runs afoul of the Constitution in three ways: (1) it impermissibly intrudes upon a power ordinarily reserved to the States; (2) it improperly interferes with Indian children's fundamental due process rights respecting family relationships; and (3) on the sole basis of race, it deprives them of equal opportunities to be adopted that are available to non-Indian children . . . ". *In Re Bridget R.*, (1996) 41 Cal. App. 4th 1483, 1512. This Judgment is plainly final on the federal issue and is not subject to further review in the state courts. The issue of determining whether Richard A. and the twins have any significant social, cultural, or political ties to the Tribe has been remanded to the trial court. If Richard A. cannot prevail at trial, then the trial court will hold that the provisions of the ICWA do not apply to this case and Richard A. will be deprived of the custody of his minor children.

Second, even if Richard A. prevails at trial on the ICWA issues, he must still demonstrate to the trial court that a return of custody of his minor children to him will not cause the minors any harm.

> . . . we believe it would constitute a violation of the Due Process Clause of the Fifth and Fourteenth Amendments to remove a child from a stable placement, based on statutory violations

> which occurred in making the placement, without a hearing to determine whether the child would suffer harm if removed from that placement. . . . such a constitutional mandate cannot be avoided by reliance on the *statutory* provisions of ICWA (original emphasis).

Id. at 1517.

Finally, even if Richard A. were to prevail at trial on all of these issues and make unnecessary further consideration of the constitutional questions, there would still remain in effect the unreviewed decision of the California Court of Appeals that young children, who clearly fall within the ICWA definition of an "Indian child", are not afforded the protections of the ICWA unless or until they prove at trial that they come within the judicially created "existing Indian family" exception.

Delaying final decision on the Fifth, Tenth, and Fourteenth Amendment claims until after trial would leave unanswered whether the ICWA is constitutional without the "existing Indian family" exception, leave to state courts to determine on a piece-meal basis whether the ICWA without the exception is constitutional and would further erode the strong federal policy adopted by Congress in the ICWA to protect the removal of Indian children, as *defined by Congress,* under the ICWA from their Indian families.

On the other hand, if this Court grants the Tribe's petition and rules: (1) that the ICWA is constitutional without the "existing Indian family" exception and (2) that the provisions of 25 U.S.C. §1913 require the return of the twins to Richard A., then this litigation is over.

Because the issue of the constitutionality of the ICWA "could survive" in this case "regardless of the outcome of further state court proceedings," this case falls within the second exception to the finality rule established in *Cox* and this Court has jurisdiction to hear this case.

III.

THE TRIBE NEVER ABANDONED ITS PREEMPTION ARGUMENT.

State law is preempted by federal law "if the state law conflicts with [federal law] (*California v. Zook*, 336 U.S. 725, 731 (1949)) or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

For respondents to argue that the Tribe abandoned its federal preemption argument is absurd, given the record in this case. Before the California Court of Appeals and the California Supreme Court, the Tribe argued that the "existing Indian family" exception doctrine violated the provisions of the ICWA and were inconsistent with the Congressional policies and objectives embodied in the Act.

The fact that the Tribe is now using the word "preemption" in framing its arguments does not alter the fact that throughout these proceedings, the Tribe argued that the decision below violated federal law (i.e., was preempted). Because the Tribe never abandoned this argument below it is not precluded from raising it now.

IV.

THE INTERESTS OF THE MINORS WOULD BEST BE SERVED IF THE COURT GRANTED THE TRIBE'S PETITION

James and Colette R. have custody of the twins only because federal law was violated. If the California Court of Appeals had not issued a stay of the Superior Court's Order, visitation between the twins and the natural parents would have continued and a reunification plan implemented that would have reunified the twins with their natural parents.

The twins are now 3½ years old. They are at a stage in their lives when they are beginning to develop an identity separate from their primary caretakers. Through a structured reunification plan, the Tribe asserts that the twins could be reintroduced to their natural parents and allowed to form a parent-child bond without causing them serious emotional harm. The Tribe believes that it is in the best interests of the twins to have the full association of their natural parents, grandparents, and the Tribe. Only by knowing their ethnic and cultural identity and participating in their Tribal government, as Tribal citizens, can the twins develop a strong, positive image of themselves.

The Tribe agrees with the respondent that it is in the twins' best interests to have this matter resolved as soon as possible. Rather than have all of the parties, including the twins, go through a lengthly hearing before the trial court on remand to determine whether the ICWA applies in this case, this Court should grant the Tribe's petition. By granting its Writ, this Court will expedite, not delay, the conclusion of this case which, even the respondents admit, is in the best interests of the twins.

V.

THIS COURT SHOULD GRANT THE TRIBE'S WRIT FOR ALL THE REASONS SET FORTH IN THE TRIBE'S PETITION.

In its petition, the Tribe amply demonstrated to this Court that this case poses important issues of federal Indian law that have not been previously addressed by this Court but which should be addressed in order to resolve the conflict between the highest courts of the States on this issue of whether the ICWA violates the United States Constitution. The respondents opposition should not divert the Court's attention away from the real reasons why this Court should grant the Writ. This Court should grant this Writ to resolve the conflict between the state courts on this issue and to ensure that the full purposes and objectives of Congress in adopting the ICWA as a uniform national policy are not frustrated.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the petition, if and when the Court acts on the Petition for Writ of Certiorari, the Petition should be granted.

Dated this 1st day of April, 1996.

Respectfully submitted,

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